United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: July 18, 1997

CASE NO: 95 INA 273

In the Matter of:

JOHN MINARDI,
Employer,

On Behalf of:

MARIA HOFMAN,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Maria Hofman (Alien) by John Minardi (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On February 3, 1993, the Employer applied for labor certification to permit her to employ the Alien on a permanent basis as a "Foreign Food Cook" to perform the following duties in her household:

> Prepare meats, soups, sauces, vegetables. Season and cook food according to Polish recipes. Portion and garnish food. Prepare specialty entrees such as borscht, cold beat soups, stuffed cabbage, potato pancakes, pierogis, blintzes, beef loin, beef ham Tartar-style meat. Use pressure cookers, microwave oven, electric grinder and mixer. Bake poppy seed cake, apple and cheese cakes.

The position was classified as "Cook, Domestic Ser." under DOT Code No. 305.281-010.[2] The application (ETA 750A) indicated the minimum education requirement of elementary and high school graduation, but specified that applicants must have two years of experience in the Job Offered. The basic workweek is forty hours from 10:00 AM to 6:00 PM, at $12.48 per hour, with no indication that any overtime work was to be required. As the Alien worked from September 1991 to February 19, 1994, as a Family Dinner Service Specialist at a residence in New York, N.Y., and completed high school in Poland, she meets the qualifications stated by the Employer's application.

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[2]DOT No. **305.281-010 Cook (Domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

Notice of Findings. On August 15, 1994, a Notice of Findings (NOF) was issued to advise that certification would be denied unless the Employer corrected the defects that the CO noted.

1. The CO said the Employer's application failed to establish that the position at issue was permanent fulltime work within the meaning of 20 CFR § 656.50.[3] Explaining that the work required in cooking for the household and carrying out the related food preparation duties described in the application did not require forty hours per week of work in the position that the in the application described, the CO said this did not appear to constitute fulltime employment.

To rebut this finding the Employer was directed to submit evidence that the job arises from business necessity, rather than from the Employer's preference or convenience, and that the work of this position is customary to the Employer. To demonstrate that the position is fulltime employment the Employer was instructed to provide evidence that would describe the number of meals prepared daily and weekly, the length of time required to prepare each meal, and the individuals for whom each such meal was prepared. In addition, Employer was directed to document in similar fashion the meals required for entertainment, the other duties of this job, and any other information that would clearly establish that this is a permanent, fulltime job to perform work that the Employer customarily requires. 20 CFR § 656.21(b)(2)(i).

2. Noting clerical errors in the production of the required advertisements and other defects, the CO directed that the position description in the advertisement be corrected and that the job be readvertised pursuant to 20 CFR §§ 656.21(g) and 656.24(b)(2)(i).[4] AF 54-58.

Rebuttal. Employer's August 29, 1994, rebuttal agreed to remedy the clerical errors and readvertise the position, if he was instructed to do so. He then discussed his need for the services of a cook in his household for family and business purposes pursuant to the other directions of the NOF.

The Employer said he has guests to the house for evening meetings that include dinner as often as three times per week, he said. To document his need for a Polish specialty cook Employer attached his 1992 diary which, he said, would show the dates when he entertained business guests at his house to discuss "business issues." AF 59-186 (127 pp). He argued that the ethnic background of his business guests required him to have the meals prepared

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[3]20 CFR § 656.50 has been recodified as 20 CFR § 656.3.

[4]The NOF required only that the Employer signify his willingness to readvertise when told to do so.

"according to the Polish tradition." As the identity and backgrounds of the guests and the number of meals served could not be derived from his diary, the dates and frequency of the entertainment could be estimated, but the extent of Employer's need for a specialty cook cannot be determined, and the evidence did not demonstrate the asserted ethnicity of his guests on which his business necessity was based. Compare AF 56.

After 1992, continued the Employer, his wife became employed from 9:00 AM to 3:30 PM, daily, and from 7:00 PM to 9:30 PM on Monday through Thursday. Consequently, she ceased to cook for the family and for his guests, although his mother-in-law and his wife's aunt continued to do so. The Employer expects that the worker would prepare fifteen meals weekly for the family of three and five meals a week for from two to six guests. Offering no financial evidence to support his capacity to pay the cook, the Employer asserted that he could afford the salary he is offering, nevertheless.

Final Determination. On September 23, 1994, the CO denied certification on grounds that the Employer failed to prove that the position was fulltime employment under the Act. After noting Employer's compliance in its offer to readvertise, the CO reviewed the rebuttal to consider the documentation offered, and concluded that the Employer failed to prove critical facts under the issues discussed in the NOF. The Employer had been required to demonstrate that his business need for a fulltime cook bore a reasonable relationship to this job position in the context of Employer's business, and was essential to Employer's household and business needs. The CO observed, inter alia, that Employer initially had asserted that his business was in fields other than real estate, but later contended that he needed the services of a full time Polish style cook to provide frequent business dinners for real estate investors. AF 209.

After listing the forms of evidentiary proof that Employer failed to produce in the rebuttal, the CO said the Employer had not complied with the instructions to submit evidence of his real estate business enterprises. The CO also found that, aside from the contradiction between the Employer's previous description of these meetings and his later version of these facts, the Employer had not submitted persuasive evidence of the business necessity of a fulltime Polish style cook. AF 209.

Employer's appeal. In seeking review of the denial of certification the Employer restated the evidence and arguments of his rebuttal, contending that he is a real estate investor and not a real estate broker and that he can promote real estate investments to other investors for the purpose of purchasing real estate, for which no license is required. Employer then cited **Crystal Shamrock, Inc.**, 81-INA-180(1981), for the criterion under

which the evidence is to be weighed, and the Employer requested that the CO's Final Determination be reversed. AF 211-214.

DISCUSSION

This case presents an unexpected variation on the use of a household cook, as the Employer's family apparently does not require Polish ethnic cooking to satisfy its own tastes. Instead, the Employer holds himself out as a businessman who requires the services of a Polish cook who will prepare and serve Polish specialty dishes to help him entertain and sell potential investors of Polish ethnic background on the merits of real estate promotions, to which he vaguely alluded in his application and rebuttal. In this sense Employer's demand for a specialty cook could be viewed as a restrictive requirement, the business necessity of which the CO required him to establish in the NOF. The paucity of the information the Employer furnished prevents a detailed analysis of this aspect of his application, however.

Before discussing this appeal it is appropriate to observe that the privileged status, which certification would confer on the Alien in this case, is an exception to a statutory limitation on immigration for permanent residence and employment in the United States. Certification is a privilege that the Act confers by giving favored treatment to specified foreign workers, whose skills Congress seeks to bring to the U. S. labor market to meet a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the statutory privilege Employer seeks is clearly indicated in the Act and regulations:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act ... .

20 CFR § 656.2(b), quoting § 291 of the Act (8 U.S.C. § 1361). As the certification for the Alien that the Employer seeks under the Act is an exception to its broad limits on immigration into the United States, the Act and regulations are strictly construed as statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting that exemption. 73 Am Jur2d § 313, p. 464, citing

United States v. Allen, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).[5]

Based on the Employer's explanation of the family situation that prompted his application, the NOF required the Employer to prove that his job offer was consistent with the definition of "employment" and listed the explicit evidentiary data needed to prove its business necessity in the context of this household. The Employer did not comply with the NOF, however, as his answers were conclusory and unpersuasive, and they were not supported by the evidence of record. It follows that the CO correctly found that the Employer did not sustain his burden of proving that the position described in the application constitutes full time employment in his household and business. Moreover, the Employer's appeal does not raise any issue that the CO's findings of fact were mistaken or erroneous. The only issue the Employer raised in this appeal is whether the CO lawfully required Employer to establish the business necessity for the position under the Act and regulations. Instead of demonstrating the existence of the position, the Employer challenged the CO's requirement that he provide supporting evidence, which included proof that his household and business historically had employed a cook to perform the functions listed.[6] By reason of the deficiencies cited, his need for a cook arises from Employer's anticipation that the services of his mother-in-law might not in the future be available. The Employer never explained why it was impossible for him to use any alternative means of providing for his family's meals and for his business entertainment.

His submission of one hundred and twenty-seven photocopied pages of the Employer's business diary for the year 1992 did not comply with the explicit and reasonable instructions of the NOF. As a result, the Employer effectively withheld the evidence that the CO requested, which was essential to the determination of this case for these reasons. On its face, this information was entirely within the Employer's control and was within his power to produce. It is our opinion that where the CO has requested evidence with a direct bearing on the determination of his request for certification and which the Employer can obtain by reasonable efforts, the Employer must adduce the data requested.

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[5]In construing a tariff act, the Supreme Court there held that, "Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption," citing its previous decisions in **People v. Cook**, 148 U.S. 397, 13 SCt 645; and **Keokuk & W. R. Co. v. Missouri**, 152 U. S. 301, 306, 14 SCt 592.

[6]Employer responded that his mother-in-law, who had done this work, could no longer perform the duties of the position in behalf of the household, but admitted that he had not employed any person in such a position, but offered no other evidence in support of the business necessity of the proposed employment.

Gencorp, 87 INA 659(Jan. 13, 1988)(en banc). In this case the Employer did not deny that he controls the requested information, but instead he chose to submit his diary with no explanation of that part of its contents that he believed assisted in his proof that there was a business necessity for the position requested in his application.

Summary. The NOF required the Employer to establish that his job offer is bona fide and meets the definition of "employment" stated in 20 CFR § 656.3, by demonstrating that his need for the position was customary to the Employer, and that it arose out of the Employer's business requirements and not out of Employer's personal preference and convenience. While Employer's diary has been carefully examined, it does not establish that he has a need for a full time cook at his home. Moreover, Employer's responses to explicit demands for relevant information in the NOF were conclusory in that they were not supported by either the diary or by any other evidence of record. As a result, the Employer's answers were not credible, and he failed to sustain his burden of proof.

Since the evidence supporting Employer's need for a Polish specialty domestic cook is incomplete and does not present a realistic picture of the nature, requirements, and demands of the job components required by either his household or his business, the CO's conclusion that the rebuttal to the NOF is insufficient for the purposes of this proceeding is logical and is consistent with the evidence of record. The CO's finding that the Employer did not sustain his burden of proving the business necessity for this position in his household for the reasons stated in the Final Determination should be affirmed and certification should be denied.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed for the reasons set forth herein.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

JOHN MINARDI, Employer,
MARIA HOFMAN, Alien

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PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 24, 1997.